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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IN RE CAPACITORS ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO:

Avnet, Inc., v. Hitachi Chemical Co., Ltd., et al., Case No. 17-cv-7046-JD;

The AASI Beneficiaries' Trust, by and through Kenneth A. Welt, Liquidating Trustee, v. AVX Corp. et al., Case No. 3:17-cv-03472-JD;

Benchmark Electronics Incorporated, et al., v. AVX Corporation, et al., Case No. 17-cv-7047-JD; and

Arrow Electronics, Inc. v. ELNA Co., Ltd., et al., Case No. 3:18-cv-02657-JD

Master File No. 17-md-02801-JD

CERTAIN DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND, IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT ON DIRECT ACTION PLAINTIFFS' CLAIMS

Date: August 29, 2019
Time: 10:00 a.m.
Judge: Hon. James Donato
Courtroom: 11, 19th Floor

PUBLIC REDACTED VERSION

NOTICE OF MOTION AND MOTION

TO THE COURT, ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on August 29, 2019, at 10:00 a.m., or as soon thereafter as this matter may be heard before the Honorable James Donato, U.S. District Court Judge, U.S. District Court for the Northern District of California, 450 Golden Gate Avenue, 19th Floor, Courtroom 11, San Francisco, California 94102, certain Defendants[1] will and hereby do move the Court, pursuant to Federal Rule of Civil Procedure 56, for summary judgment and, in the alternative, partial summary judgment as to the claims of Direct Action Plaintiffs Avnet, Inc., The AASI Beneficiaries' Trust, by and through Kenneth A. Welt, Liquidating Trustee, Benchmark Electronics, Inc., and Arrow Electronics, Inc. (collectively, "DAPs"). This Motion is based upon this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the concurrently-filed declaration of Eric P. Enson and its attached exhibits, any other matters found in the record, argument of counsel, and such other and further matters as the Court may consider.

STATEMENT OF ISSUES TO BE DECIDED

1. Whether DAPs have come forward with evidence capable of raising a genuine issue of material fact to satisfy their burden of proving that they suffered a cognizable injury as a result of the alleged conspiracy.

2. In the alternative, whether DAPs have come forward with evidence capable of raising a genuine issue of material fact to satisfy their burden of proving that certain United States-based Defendants, in particular KEMET Corporation, KEMET Electronics Corporation and AVX Corporation, and suppliers of film capacitors participated in the alleged conspiracy.

[1] The following Defendants join in this Motion: Holy Stone Enterprise Co., Ltd.; Milestone Global Technology, Inc. (doing business as HolyStone International); Vishay Polytech Co., Ltd.; ELNA Co., Ltd.; ELNA America, Inc.; Matsuo Electric Co., Ltd.; Nippon Chemi-Con Corporation; United Chemi-Con, Inc.; Hitachi Chemical Co., Ltd.; Hitachi AIC Inc.; Hitachi Chemical Co. America, Ltd.; Nichicon Corporation; Nichicon (America) Corporation; Rubycon Corporation; and Rubycon America Inc. The Holy Stone, Hitachi Chemical, Nichicon and Rubycon Defendants join this motion only as to the Avnet, AASI and Benchmark actions.

Dated: June 14, 2019

RESPECTFULLY SUBMITTED

JONES DAY

By: */s/ Eric P. Enson*
Eric P. Enson

Attorneys for Defendants
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INTRODUCTION

Direct Action Plaintiffs Avnet, Inc., The AASI Beneficiaries' Trust, by and through Kenneth A. Welt, Liquidating Trustee, Benchmark Electronics, Inc., and Arrow Electronics, Inc. (collectively, "DAPs"), allege a seventeen-year, overarching conspiracy among twenty-plus capacitor manufacturers to fix prices on aluminum, tantalum and film capacitors sold in the United States. Even more sweeping than their claim of conspiracy is DAPs' allegation that ***each and every*** aluminum, tantalum and film capacitor they purchased from Defendants[2] was at an inflated price due to the alleged conspiracy. Allegations aside, it is now incumbent on DAPs to produce evidence supporting the elements of the claims they intend to present to the jury. But as to at least one element – causal antitrust injury – DAPs cannot. *See Northwest Publ'ns, Inc. v. Cumb*, 752 F.2d 473, 476 (9th Cir. 1985) ("Causal antitrust injury is an essential element of any remedy under the Sherman Act.").

Based on the evidentiary record, a reasonable jury could not conclude that DAPs suffered an overcharge on each and every one of their capacitor purchases from Defendants due to the alleged conspiracy. There is no evidence that Defendants targeted sales to DAPs and then followed through on a collusive agreement to fix prices charged to DAPs. Indeed, in the millions of documents produced, and the scores of depositions taken, in this litigation, ***not a single one*** evidences communications, much less an agreement, among Defendants regarding DAPs, as DAPs' own expert has conceded. Nor is there evidence that DAPs were among the types of purchasers contemplated by Defendants' allegedly-collusive conduct, or evidence of a market mechanism that caused DAPs to suffer harm from such conduct. In fact, the evidence DAPs rely upon, such as meetings among Japanese manufacturers in Asia about Asian customers and plea agreements regarding "certain" capacitors, says nothing about how DAPs could have been overcharged on all of their capacitor purchases from Defendants. There is, instead, substantial

[2] In their separate actions, DAPs filed claims against different sets of Defendants, likely because of existing supply relationships, but also identified sets of alleged co-conspirators in their complaints. Thus, in this Motion, "Defendants" refers to the entities named as defendants in the individual DAP cases as well as alleged co-conspirators in those cases.

evidence that DAPs – with their purchasing power, procurement processes designed to maximize competition among suppliers and their mix of Defendant and non-Defendant suppliers – avoided overcharges by regularly minimizing the capacitor prices they paid. And while DAPs will certainly rely on expert testimony, they will offer no expert testimony based on record evidence or "market facts" that makes a causal link between Defendants' alleged conduct overseas and an overcharge on all of DAPs purchases from Defendants in the United States. *See In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 914, 923-24 (9th Cir. 2015) ("the mere proffering of unsupported expert testimony does not create a triable issue as to antitrust injury-in-fact.").

To be clear, this is not a motion about damages or amount of harm. It is, instead, a motion challenging whether DAPs, after years of discovery, can establish "with reasonable probability" that "the alleged anticompetitive activity was a material cause of the injury" alleged in the case DAPs plan to present at trial. *Catlin v. Wa. Energy Co.*, 791 F.2d 1343, 1347 (9th Cir. 1986) (internal quotation marks omitted). DAPs, however, cannot answer this challenge because they have no factually-supported theory, or evidence, linking Defendants' alleged conduct to an overcharge on all of their capacitor purchases from Defendants. Summary judgment for Defendants is, therefore, appropriate.

In the alternative, partial summary judgment on DAPs' claims regarding their purchases from American capacitor manufacturers KEMET Corporation and KEMET Electronics Corporation (together "KEMET") and AVX Corporation ("AVX") should be granted. As DAPs own expert has acknowledged, there is no evidence that KEMET or AVX participated in meetings with Japanese suppliers in Japan or otherwise joined the alleged conspiracy. To the contrary, there is direct evidence and sworn testimony that KEMET and AVX were not part of the alleged conspiracy, which has been corroborated by antitrust regulators' uniform decision to not seek charges against them.

Partial summary judgment should also be granted on DAPs' claims regarding purchases of film capacitors. A reasonable jury simply could not conclude, based on all of the evidence, that film capacitors were ever a subject of the conspiracy alleged by DAPs.

UNDISPUTED MATERIAL FACTS

Industry Background. Capacitors are components that are fundamental to all electronic devices.[3] "Capacitors store electrical energy and help regulate the flow of the electrical current as it moves through a circuit."[4] The most common types of capacitors are aluminum, tantalum, film and ceramic capacitors. DAPs bring claims as to aluminum, tantalum and film capacitors only.[5]

Avnet and its Capacitor Purchases. Avnet is a New York corporation with its principal place of business in Phoenix, Arizona.[6] Avnet is "a major U.S. distributor of electronic components, including capacitors."[7] In fact, Avnet is [redacted].[8] [redacted].[9] [redacted].[10]

As a major capacitors distributor, Avnet exerted its purchasing power over capacitor suppliers. For instance, Avnet regularly [redacted]

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[3] Case No. 17-cv-7046-JD, Avnet Amended Complaint ("Avnet Compl.") (ECF No. 76), ¶ 2.

[4] *Id.*

[5] *Id.* at ¶ 90.

[6] Avnet Compl. at ¶ 29.

[7] *Id.*

[8] Ex. 1 (Deposition of Vincent Arena ("Arena Dep.")) at 49:19-50:4, 149:3-13; Ex. 2 (Deposition of Gerald Fay ("Fay Dep.")) at 88:14-89:14. All exhibits referenced herein are attached to the accompanying declaration of Eric P. Enson.

[9] Ex. 1 (Arena Dep.) at 77:14-25.

[10] *Id.* Dep. at 159:20-24; Ex. 2 (Fay Dep.) at 95:14-96:24; Ex. 3 (Deposition of Michael Ulch ("Ulch Dep.")) at 65:23-67:16; Ex. 4 (Expert Report of Leslie Marx, Ph.D ("Marx Report") at p. 69, Figure 28.

[redacted].[11] In addition, [redacted] [redacted].[12]

AASI and its Capacitor Purchases. AASI was a Delaware corporation with its principal place of business in Miami, Florida.[13] In April 2007, AASI [redacted].[14] While it was in business, AASI was "a major U.S. distributor of electronic components, such as capacitors."[15] AASI [redacted],[16] but of the [redacted].[17]

Like Avnet, AASI [redacted].[18] [redacted].[19] [redacted].[20] [redacted],[21] [redacted]

[11] Ex. 1 (Arena Dep.) 140:4-142:17; Ex. 2 (Fay Dep.) at 99:10-23 (testifying that [redacted]); Ex. 4 (Ulch Dep.) at 82:3-84:5 (testifying that [redacted].

[12] Ex. 1 (Arena Dep.) at 155:3-17; Ex. 3 (Ulch Dep.) at 84:10-85:24.

[13] Case No. 3:17-cv-03472-JD, AASI Complaint (ECF No. 1) at ¶ 26.

[14] *Id.*; Ex. 5 (Deposition of John Jablansky ("Jablansky Dep.")) at 190:5-8.

[15] AASI Compl. at ¶ 26.

[16] Ex. 5 (Jablansky Dep.) at 363:13-365:5.

[17] *Id.* at 217:18-23, 223:21-225:19, 191:12-199:6; Ex. 6 (Deposition of Shell Johnson ("Johnson Dep.")) at 83:6-87:19, 102:19-103:22, 150:14-154:22.

[18] Ex. 5 (Jablansky Dep.) at 154:1-157:17; Ex. 6 (Johnson Dep.) at 136:3-142:3 (testifying that [redacted]), 150:1-12, 273:6-274:1, 376:3-378:18.

[19] Ex. 5 (Jablansky Dep.) at 148:17-153:25, 161:15-163:13; Ex. 6 (Johnson Dep.) at 173:14-178:5.

[20] Ex. 5 (Jablansky Dep.) at 303:20-307:13, 319:8-321:12, 324:3-325:5.

[21] *Id.* at 170:11-171:2.

[redacted].[22] And like Avnet, AASI [redacted].[23]

Arrow and its Capacitor Purchases. Arrow is a New York corporation with its principal place of business in Centennial, Colorado.[24] Arrow is "a leading U.S. seller of electrical components and a provider of products, services and solutions to industrial and commercial users of electronic components and enterprise computing solutions around the world."[25] Arrow [redacted].[26]

As a major capacitors distributor, Arrow, like Avnet and AASI, exerted its purchasing power over its capacitors suppliers. For instance, Arrow [redacted].[27] In addition, [redacted]."[28]

Benchmark and its Capacitor Purchases. Benchmark is a Texas corporation with its principal place of business in Tempe, Arizona.[29] Benchmark "is a full-service electronic manufacturing services company and is a major purchaser of electronic components, including capacitors, in the U.S."[30] Benchmark [redacted].[31]

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[22] *Id.* at 338:10-344:17; Ex. 6 (Johnson Dep.) at 160:17-167:1, 256:11-256:25.

[23] Ex. 5 (Jablansky Dep.) at 367:7-369:3, 382:2-383:18 ("[redacted]"), 171:17-173:16, 154:12-155:8.

[24] Case No. 3:18-cv-02657-JD, Arrow Complaint ("Arrow Compl.") (ECF No. 1) ¶ 29.

[25] *Id.*

[26] Ex. 7 (Deposition of Vince Pastor ("Pastor Dep.")) at 122:8-12.

[27] *Id.* at 137:7-138:16, 141:16-142:18.

[28] *Id.* at 157:2-22.

[29] Case No. 17-cv-7047-JD, Benchmark Complaint ("Benchmark Compl.") (ECF No. 1) at ¶ 28.

[30] *Id.*

[31] Ex. 8 (Deposition of Shabnam Shaghafi ("Shaghafi Dep.")) at 148:9-13, 275:5-25 (testifying that [redacted]

But Benchmark [redacted][32]

As a major electronic manufacturing services ("EMS") company, Benchmark [redacted][33] [redacted][34] As is common in the EMS industry, [redacted][35] Benchmark also [redacted][36] When negotiating with distributors, [redacted][37]

The Alleged Conspiracy and DAPs' Theory of Harm. DAPs allege a broad, overarching conspiracy between about twenty-two capacitor manufacturers to fix the prices of all the aluminum, tantalum and film capacitors they sold between September 1997 and March 2014.[38]

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[32] *Id.* at 131:25-143:2.

[33] *Id.* at 26:20-25, 94:11-95:12 ([redacted]'), 126:24-127:3, 241:4-244:11 (testifying that [redacted]; *Id.* at 321:24-325:1, 99:6-18, 101:21-102:1, 303:9-304:21, 383:11-385:18 (testifying that [redacted]

[34] *Id.* at 118:19-123:13, 162:10-165:2.

[35] *Id.* at 149:11-154:18, 157:14-158:17, 160:1-161:20 (testifying that [redacted]), 168:7-23 (testifying that prices [redacted]; Ex. 9 (Deposition of Matthew Cross ("Cross Dep.")) at 58:16-59:7 (testifying that [redacted]").

[36] Ex. 8 (Shaghafi Dep.) at 199:18-200:20, 210:18-25, 211:15-217:20, 237:20-240:15; Ex. 9 (Cross Dep.) at 141:9-146:17.

[37] Ex. 9 (Cross Dep.) at 143:22-146:17 ([redacted]); Ex. 8 (Shaghafi Dep.) at 252:1-253:24.

[38] AASI Compl. at ¶ 1; Benchmark Compl. at ¶ 1. Avnet alleges a different "Conspiracy Period" of November 2001 through January 2014, Avnet Compl. at ¶ 1, which is the period that DAPs' expert chose to use in her regression model.

DAPs allege that this conspiracy was carried out through "regular and ad hoc group and bilateral meetings and communications during which [Defendants] discussed and coordinated strategy for achieving their desired anti-competitive ends."[39] DAPs' allegations and evidence relate, almost exclusively, to meetings and communications between Japanese capacitor manufacturers in Japan.[40] DAPs also rely upon the investigation of the Antitrust Division of the United States Department of Justice ("DOJ"), which resulted in several Japanese capacitor manufacturers entering into plea agreements regarding meetings and communications in Japan about sales of "certain" aluminum and tantalum capacitors, as described below.[41]

DAPs each allege that they purchased aluminum, tantalum and/or film capacitors in the United States directly from Defendants at supracompetitive prices.[42] In discovery, DAPs asserted that ***each and every*** aluminum, tantalum and film capacitor they purchased from Defendants during the relevant time period was at an inflated price due to the alleged conspiracy.[43] DAPs' economist, Leslie M. Marx, PhD, assumed this allegation to be true and opined that [redacted][44]

DOJ's Investigation and Resulting Evidence. In early-2014, DOJ launched its investigation of alleged collusion among Japanese capacitor manufacturers. As a result, eight capacitor manufacturers entered into plea agreements with DOJ regarding the sale of "certain" aluminum and/or tantalum capacitors sold in the "United States and elsewhere" during varying

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[39] Avnet Compl. at ¶ 7; AASI Compl. at ¶ 7; Benchmark Compl. at ¶ 7.

[40] Avnet Compl. at ¶¶ 133-185; AASI Compl. at ¶¶ 148-196; Benchmark Compl. at ¶¶ 157-205.

[41] Avnet Compl. at ¶¶ 13-22; AASI Compl. at ¶¶ 13-19; Benchmark Compl. at ¶¶ 13-21.

[42] Avnet Compl. at ¶ 23; AASI Compl. at ¶ 20; Benchmark Compl. at ¶ 22.

[43] When asked in discovery to identify the capacitor purchases on which Plaintiffs were asserting claims for damages, Plaintiffs directed Defendants to their "transactional data reflecting [their] purchases of Capacitors during the Relevant Time Period," meaning all of their purchases of aluminum, tantalum and film capacitors. *See e.g.*, Ex. 10, Avnet's Objections and Responses to Defendants' First Set of Interrogatories, Response to Interrogatory Nos. 1, 2, 4, 5.

[44] Ex. 11 (Deposition of Leslie M. Marx, Ph.D. ("Marx Depo.")) at 203:22-204:3.

time periods.[45] In addition, Panasonic / Sanyo applied for, and received on a conditional basis, leniency from DOJ under the Antitrust Criminal Penalty Enforcement and Reform Act.[46] DOJ, however, has explained to this Court that the charges supporting, and the factual bases underlying, the plea agreements relate only to "certain" sales and customers – "[n]ot all [] U.S. customers were necessarily victims."[47]

In January 2016, DOJ closed its investigation of the film capacitors industry without taking any action, and none of the plea agreements refer to film capacitors at all.[48] In addition, evidence gathered during the civil litigation indicates that the factual bases underlying certain of the plea agreements were not nearly as broad or all-encompassing as the conspiracy alleged by DAPs. The conduct did not extend beyond Japanese aluminum and tantalum capacitor manufacturers, and the conduct related primarily to customers in Asia, not DAPs.[49]

[45] *See* NEC Tokin Corporation (Case No. 15-cr-426), Hitachi Chemical Co., Ltd. (Case No. 16-cr-180), ELNA Co., Ltd. (Case No. 16-cr-365), Holy Stone Holdings Co., Ltd. (Case No. 16-cr-366), Rubycon Corporation (Case No. 16-cr-367), Nichicon Corporation (Case No. 17-cr-368), Matsuo Electric Co. Ltd. (Case No. 17-cr-73), and Nippon Chemi-Con Corporation (Case No. 17-cr-540); *see also* Order Re Direct Purchaser Plaintiffs Class Certification Motion ("Class Cert. Order") (ECF No. 385) at 8.

[46] Class Cert. Order at 8.

[47] *United States v. Elna Co., Ltd.*, 4:16-cr-00365-JD, United States Memorandum Re Restitution (ECF No. 65) at 3 (noting that "the affected volume of commerce was not as broad as all U.S. sales. . . ."); *see also United States v. Holy Stone Holdings Co., Ltd.*, 4:16-cr-0366-JD, United States' Supplemental Sentencing Memorandum (ECF No. 16) at 4 ("Defendant Holy Stone's volume of affected commerce is based entirely on sales to the one United States customer for which Holy Stone Japan was responsible for negotiating prices."); *United States v. Nippon Chemi*-Con, 4:17-cr-00540-JD, Plea Agreement (ECF No. 54) at ¶4(b) (explaining that the DOJ specifically carved out of NCC's plea any capacitors manufactured by its American subsidiary, describing the conspiracy as an agreement "to fix the price and/or rig bids of certain electrolytic capacitors manufactured outside of the United States," and not those manufactured inside the United States).

[48] *See* Ex. 12 (composite of letters from the Department of Justice, previously marked in this litigation as Deposition Exhibits 9018-9021).

[49] *See* Ex. 13 (Depositions of Kent Sterrett ("Sterrett Dep.")) at 95:24-96:14, 133:11-25 (testifying that [redacted] Ex. 14 (Deposition of Kevin Sheldon ("Sheldon Dep.")) at 714:21-715:15 (testifying that [redacted]; Ex. 15 (Deposition of Shuji Takada ("Takada Dep.")) at 70:10-72:22, 67:16-69:21, 56:11-57:3, 75:23-78:10, 137:2-8, 288:24-292:19 (testifying that the factual basis underlying the Holy Stone's plea agreement were discussions in the Summer of 2010 between Holy Stone Polytech Co., Ltd. employees and the employee of a single Japanese tantalum capacitor manufacturer, Matsuo, regarding several customers located in Asia); Ex. 16 (Deposition of Hiroyuki Koga ("Koga Dep.")) at 85:2-14, 90:8-91:16, 96:16-97:9 (testifying that

ARGUMENT

"Causal antitrust injury is an essential element of any remedy under the Sherman Act." *Northwest Publ'ns*, 752 F.2d at 476. This is because private plaintiffs can only recover for injuries suffered "by reason of" a violation of the antitrust laws. 15 U.S.C. § 15(a). "Even if a defendant's acts are shown to be violative of the statute, therefore, a plaintiff may not recover unless a nexus of its own injury is also demonstrated." *Sound Ship Bldg. Corp. v. Bethlehem Steel Co.*, 533 F.2d 96, 98 (3d Cir. 1976); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9 (1969). Thus, the question presented in this Motion is whether a reasonable trier of fact could conclude, on the record as a whole, that Defendants "entered into an illegal conspiracy that caused [the DAPs] to suffer a cognizable injury." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-86 (1986).

To establish a "causal antitrust injury," DAPs must show "with reasonable probability" that "the alleged anticompetitive activity was a material cause of the injury" alleged. *Catlin*, 791 F.2d at 1347 (internal quotation marks omitted); *Oregon Laborers-Emp'rs Health & Welfare Tr. Fund v. Philip Morris, Inc.*, 185 F.3d 957, 963 (9th Cir. 1999) (a direct relationship between injury and alleged wrongdoing is a central element of an antitrust claim). To satisfy this burden, DAPs must "develop a theory or … set out … facts … which would show a causal link between [Defendants'] acts and [the DAPs'] losses." *Sound Ship*, 533 F.2d at 98. This showing "may not be based on speculation. The required causal link must be proved as a matter of fact and with a fair degree of certainty." *Response of Carolina, Inc. v. Leasco Response, Inc.*, 537 F.2d 1307, 1321 (5th Cir. 1976) (internal quotation marks omitted); Catlin, 791 F.2d at 1347.

Because DAPs bear the burden of proof on each element of their antitrust claims, *see Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 763 (1984), Defendants may carry their

(continued…)

[redacted]; Ex. 17 (Deposition of Hiroshi Fujisaku ("Fujisaku Dep.")) at 36:5-24 (testifying that [redacted]

initial burden under Rule 56 by simply "showing—that is, pointing out to the district court—that there is an absence of evidence to support" Plaintiffs' claims of injury. *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1105 (9th Cir. 2000) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)); Fed. R. Civ. P. 56(a) (summary judgment is warranted if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."). Alternatively, Defendants may present evidence "negating" DAPs' claim. *Nissan Fire*, 210 F.3d at 1106. Defendants have met their burden under both *Nissan Fire* standards, as set forth below.

I. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON ALL OF DAPS' CLAIMS BECAUSE DAPS CANNOT RAISE A GENUINE ISSUE OF MATERIAL FACT AS TO THE EXISTENCE OF A CONSPIRACY RESULTING IN HARM TO THEM.

DAPs seek to present claims at trial that they suffered an overcharge on all of their capacitor purchases from Defendants. No reasonable jury, however, could reach this conclusion based on the evidence that exists. There is no evidence that Defendants targeted sales to DAPs and then followed through on a collusive agreement to fix prices charged to DAPs. Nor is there evidence that DAPs were among the types of purchasers contemplated by Defendants' allegedly-collusive conduct, or evidence of some mechanism that caused DAPs to suffer harm from such conduct. There is, instead, significant evidence that DAPs regularly minimized the capacitor prices they paid through a number of negotiating tactics. Finally, DAPs have no expert testimony based on record evidence or "market facts" that causally links Defendants' alleged conduct overseas to an overcharge on each and every one of DAPs' purchases from Defendants in the United States. Summary judgment for Defendants is, therefore, appropriate.

A. There Is No Evidence Causally Connecting Defendants' Conduct And DAPs' Alleged Injury.

Again, to succeed on their claims, DAPs must "show with ***reasonable probability*** some causal connection between the antitrust violation and a loss of income." *Catlin*, 791 F.2d at 1347 (citation omitted, emphasis in original). One way DAPs could potentially establish that they suffered injury as a result of the alleged conspiracy would be to present evidence that Defendants took some collusive action aimed at DAPs. *In re Optical Disk Drive Antitrust Litig.*, 2017 U.S.

Dist. LEXIS 222996, at *37 (N.D. Cal. Dec. 18, 2017) (explaining that evidence of injury may include "anti-competitive behavior directed explicitly at [the plaintiff]."). There is, however, no direct or circumstantial evidence that Defendants colluded regarding sales to DAPs.

Indeed, in the millions of documents that have been produced in this litigation, ***not a single one*** evidences communications, much less an agreement, among Defendants regarding sales to DAPs. Likewise, the scores of depositions taken in this case do not provide any evidence that Defendants targeted, conspired regarding or even discussed DAPs. DAPs' own expert, Dr. Marx [redacted][50] This lack of evidence is not particularly surprising given the fact that DAPs, along with Flextronics, [redacted][51] [redacted][52]

Perhaps another way that DAPs could attempt to establish causation would be to come forward with evidence that they were among the type of capacitor purchasers that were the subject of Defendants' allegedly-collusive conduct, or evidence of some market mechanism that caused them harm from such conduct. This, DAPs cannot do either.

Virtually all of the evidence about meetings and communications among capacitor suppliers relates to meetings and communications in Japan among Japanese manufacturers focused on capacitors sold to customers in Japan and other Asian countries. What is missing – for purposes of DAPs being able to establish injury – is evidence of collusion regarding capacitor sales to distributors or EMS companies located in the United States, or evidence of an agreement on across-the-board prices for all types of capacitors sold to United States companies, or evidence that the Defendants' capacitor prices in the United States were benchmarked off of or otherwise influenced by those charged in Asia. *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 125 (3d Cir.

[50] Ex. 11 (Marx Dep.) at 89:17-90:22.

[51] *Id.* at 21:22-22:9, 45:11-25.

[52] Ex. 1 (Arena Dep.) at 77:14-25 ([redacted]; Ex. 5 (Jablansky Dep.) at 221:4-223:5 [redacted]; Ex. 9 (Cross Dep.) at 66:18-67:10 [redacted]

1999) ("to survive summary judgment, there must be evidence that the exchanges of information had an impact on pricing decisions").

Without evidence that Defendants' allegedly-collusive conduct was aimed at DAPs or evidence that DAPs were among the types of purchasers contemplated by Defendants' allegedly-collusive conduct, DAPs have no evidentiary basis to support their allegations of harm. Put another way, DAPs cannot establish "with reasonable probability" that they paid inflated prices on all of their capacitor purchases in the United States because of Defendants' conduct in Asia. *Catlin*, 791 F.2d at 1347 (affirming District Court's rejection of the plaintiff's antitrust claims because "[n]o causal connection to [the defendant's] conduct was demonstrated"); *Oregon Laborers-Emp'rs Health & Welfare Tr. Fund*, 185 F.3d at 963 ("A direct relationship between the injury and the alleged wrongdoing, although not the sole requirement of RICO and antitrust proximate causation, has been one of its central elements.") (internal quotation marks and citation omitted); *McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 808 (9th Cir. 1988) (affirming grant of summary judgment based on the plaintiffs' failure to "make a showing sufficient to establish the amount, causation, or fact of damages").

DAPs' inability to establish causal antitrust injury is extremely similar to that evaluated by Judge Seeborg in *In re Optical Disk Drive Antitrust Litigation*. In that case, retailers Circuit City and RadioShack brought antitrust actions claiming they paid inflated prices on optical disk drives as a result of price fixing and bid rigging aimed at computer OEMs, such as Dell and HP. *In re Optical Disk Drive Antitrust Litig.*, 2017 U.S. Dist. LEXIS 209282, *26-27 (N.D. Cal. 2017). Judge Seeborg, however, granted summary judgment because Circuit City and RadioShack could not "explain any theory as to how the conspiracy would have affected customers other than those specifically targeted, let alone present any evidence that this actually occurred." *Id*. at *33. In a related case brought by computer OEM Acer, Judge Seeborg likewise granted summary judgment because "Acer failed to produce evidence that it was a target of the alleged conspiracy and failed to show that the prices it paid for optical disk drives were related to those charged to other OEMs that were allegedly targeted." *In re Optical Disk Drive Antitrust Litig.*, 2017 U.S. Dist. LEXIS 222996, at *37.

The same is true here. DAPs have no factually-supported theory or evidence explaining how the prices they paid in the United States on all of their capacitor purchases from Defendants could have been inflated by Defendants' alleged conduct in Asia regarding Asian customers.

B. The Evidence Establishes That DAPs, With Their Purchasing Power And Unique Procurement Processes, Avoided Any Overcharges On Capacitors.

Another reason DAPs cannot link their alleged injury to the alleged conspiracy is because the evidence establishes that DAPs' purchasing power, unique procurement processes and mix of capacitor suppliers allowed DAPs to minimize the prices they paid for capacitors and avoid any overcharges. The Ninth Circuit has found this type of evidence persuasive in evaluating whether antitrust plaintiffs can satisfy the injury-in-fact element on summary judgment. In *Gerlinger v. Amazon.com, Inc.*, 526 F.3d 1253, 1255 (9th Cir. 2008), for example, the plaintiff alleged that he had paid supra-competitive prices for books due to an anticompetitive agreement between booksellers, Amazon.com and Borders. But the Ninth Circuit affirmed summary judgment on the plaintiff's antitrust claims for failure to establish an injury-in-fact based on evidence that prices the plaintiff paid were the same or even lower than what he had paid before the alleged violation. *Id.* at 1255-56; *see also In re Online DVD-Rental Antitrust Litig.*, 779 F.3d at 922-24 (affirming summary judgment on antitrust claims where there was evidence that the plaintiffs did not pay supracompetitive prices and therefore did not suffer an injury-in-fact).

Here, there is significant evidence that DAPs were able to negotiate price discounts from its capacitor suppliers through a number of different mechanisms. As an initial matter, each of the DAPs [redacted][53] [redacted].[54] In addition to their purchasing power, DAPs used a number of other techniques

[53] Avnet Compl. at ¶ 29; AASI Compl. at ¶ 26; Benchmark Compl. at ¶ 28; Ex. 1 (Arena Dep.) at 49:19-50:4, 149:3-13; Ex. 2 (Fay Dep.) at 88:14-89:17 (testifying that [redacted]; Arrow Complaint at ¶ 29.

[54] Ex. 8 (Shaghafi Depo.) at 241:4-244:11 (testifying that [redacted]; Ex. 5 (Jablansky Depo.) at 148:17-153:25, 161:15-163:13 (testifying that [redacted]); Ex. 1 (Arena Depo.) at 127:4-25 (testifying that [redacted]).

to further reduce the capacitor prices they ultimately paid. For instance, Avnet "[redacted] [55] AASI [redacted] [56] [redacted] [57] As is common in the EMS industry, Benchmark [redacted] [58] And as is also common in the purchase of electronic components, DAPs [redacted] [59]

In addition, the mix of capacitor suppliers engaged by DAPs also suggests that Defendants could not have been able to saddle DAPs with the types of overcharges they allege. For example, AASI [redacted] [60] [redacted] [61] Likewise, Avnet [redacted]

[55] Ex. 2 (Fay Depo.) at 99:10-23 (testifying that [redacted]; Ex. 1 (Arena Depo.) at 140:4-142:17; Ex. 3 (Ulch Dep.) at 82:3-84:5 (testifying that [redacted]); Ex. 7 (Pastor Dep.) at 137:7-138:16, 141:16-142:18.

[56] Ex. 5 (Jablansky Depo.) at 303:20-307:13, 319:8-321:12, 324:3-325:5.

[57] *Id.* at 338:10-344:17; Ex. 6 (Johnson Dep.) at 160:17-167:1, 256:11-256:25.

[58] Ex. 8 (Shaghafi Dep.) at 149:11-154:18, 157:14-158:17, 160:1-161:20 (testifying that [redacted]"), 168:7-23 (testifying that [redacted]; Ex. 9 (Cross Depo) at 58:16-59:7 (testifying that [redacted]"); Ex. 8 (Shaghafi Dep.) at 321:24-325:1, 99:6-18, 101:21-102:1, 303:9-304:21, 383:11-385:18 (testifying that [redacted]).

[59] Ex. 1 (Arena Dep.) at 155:3-17 (as to Avnet); Ex. 3 (Ulch Dep.) at 84:10-85:24 (as to Avnet); Ex. 5 (Jablansky Dep.) at 367:7-369:3 (as to AASI), 382:2-383:18 ("[redacted]"), 171:17-173:16, 154:12-155:8; Ex. 9 (Cross Dep.) at 143:22-146:17 (as to Benchmark) ([redacted]; Ex. 8 (Shaghafi Dep.) at 252:1-253:24 (as to Benchmark); Ex. 7 (Pastor Dep.) at 157:2-22 (as to Arrow).

[60] Ex. 5 (Jablansky Dep.) at 363:13-365:5.

[61] Ex. 5 (Jablansky Dep.) at 217:18-23, 223: 21-225:19, 191:12-199:6; Ex. 6 (Johnson

[redacted][62] [redacted]
[redacted]
[redacted][63] Benchmark [redacted]
[redacted]
[redacted][64]

All of this evidence makes clear that – even if DAPs were an object of the alleged conspiracy, which is not supported by the record – Defendants would have been unable to extract the overcharges that DAPs allege. More importantly, all of this evidence establishes that a reasonable jury could not find that DAPs were overcharged on each and every one of their capacitor purchases from Defendants, which is the case DAPs plan to present to the jury. *Matsushita*, 475 U.S. at 587 ("Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" (citation omitted)); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 631 (9th Cir. 1987) (on summary judgment the Court must "determine whether the 'specific facts' set forth by the nonmoving party, coupled with undisputed background or contextual facts, are such that a rational or reasonable jury might return a verdict in its favor based on that evidence.")

C. Dr. Marx's Opinions Cannot Establish Causation Or Injury.

Critical to this Motion is the legal principle that "the mere proffering of unsupported expert testimony does not create a triable issue as to antitrust injury-in-fact." *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d at 923. Indeed, "[e]xpert testimony is useful as a guide to interpreting market facts, but it is not a substitute for them," *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242 (1993), and it is well-settled that expert opinions

(continued…)

Dep.) at 83:6-87:19, 102:19-103:22; 150:14-154:22.

[62] Ex. 1 (Arena Dep.) at 77:14-25.

[63] *Id.* at 159:20-24; Ex. 2 (Fay Dep.) at 95:14-96:24; Ex. 3 (Ulch Dep.) at 65:23-67:16; Ex. 4 (Marx Report) at p. 69, Figure 28.

[64] Ex. 8 (Shaghafi Dep.) at 199:18-200:20, 210:18-25, 211:15-217:20, 237:20-240:15; Ex. 9 (Cross Dep.) at 141:9-146:17.

lacking record support cannot defeat summary judgment. *See, e.g., Baby Food*, 166 F.3d at 135 (rejecting at summary judgment expert's economic theory and assumptions that were not supported by actual record evidence); *Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass'n*, 107 F.3d 1026, 1040 (3d Cir. 1997) (disregarding expert's report that was based on general and theoretical observations and not tied to evidence in the record, and affirming summary judgment).

Yet this is precisely what DAPs will attempt to do with Dr. Marx. At deposition, Dr. Marx [redacted]:

[redacted]

Dr. Marx, however, [redacted]. As set forth above, there is no evidence that Defendants targeted sales to DAPs and then followed through on a collusive agreement to fix prices charged to DAPs. Indeed, there is not a single document, or line of deposition testimony, that evidences Defendants ever discussing sales to the DAPs, which Dr. Marx concedes.[66] Likewise, there is no evidence that DAPs were

[65] Ex. 11 (Marx Dep.) at 133:1-16, 150:13-15 ([redacted]); *id.* at 203:22-204:3 ([redacted]); *id.* at 206:18-21 ([redacted]); *id.* at 297:6-8 ([redacted]).

[66] *Id.* at 89:17-90:22 ([redacted]).

among the types of purchasers contemplated by Defendants' allegedly-collusive conduct or victims of that conduct. And Dr. Marx offers no record evidence or "market facts" to causally link the Defendants' alleged conduct overseas and the alleged overcharge on each and every one of DAPs purchases from Defendants in the United States, as necessary for Dr. Marx to offer the causation opinion DAPs want her to offer. *Brooke Grp.*, 509 U.S. at 242. In fact, Dr. Marx testified [redacted].[67]

Moreover, the Court should decline to consider Dr. Marx's opinion on causation because it is unreliable and not "grounded in the economic reality of the [capacitors] market." *Concord Boat Corp. v. Brunswick Corp.*, 207 F,3d 1039, 1056 (8th Cir. 2000) (directing a verdict for the defendant where the jury verdict was only supported by expert opinion that "ignored inconvenient evidence"); *Volterra Semiconductor Corp. v. Primarion, Inc.*, 796 F. Supp. 2d 1025, 1045-46 (N.D. Cal. 2011) (the District Court may "decline to consider expert testimony on summary judgment [] where it is unreliable or misleading."). For example, Dr. Marx [redacted].[68] Nor did Dr. Marx evaluate the manner in which Defendants priced their capacitors.[69] In fact, Dr. Marx does not even analyze, or consider, the actual prices charged by Defendants to the individual DAPs, despite having all of the data available to her. Instead, she [redacted].[70] In other words, Dr. Marx does not look to see what DAPs actually paid for capacitors in relation to other purchasers, she just lumps them all

[67] *Id.* at 205:13-17 [redacted]").

[68] *Id.* at 83:8-12 ("[redacted]").

[69] For example, Dr. Marx testified [redacted] *Id.* at 364:6-372:15.

[70] *Id.* at 24:22-25:1.

together to calculate an overcharge. And there certainly are other flaws in Dr. Marx's analysis that render her model unreliable, as set forth in the concurrently-filed Motion to Exclude Dr. Marx's opinion.

Again, Judge Seeborg addressed similar situations in *In re Optical Disk Drive Litigation*. There, because "Acer point[ed] to no direct evidence supporting its theory of harm," Acer offered "the expert report of Dr. Macartney, who present[ed] six theories as to how the conspiracy increased the prices of ODDs purchased by Acer." *In re Optical Disk Drive Antitrust Litig.*, 2017 U.S. Dist. LEXIS 222996 at *37. But Judge Seeborg found that Dr. Macartney's opinion could not create a genuine issue of material fact as to causation because "Dr. Macartney's opinion is just that--an opinion--which fails to highlight the necessary facts and supporting evidence that such a genuine issue exists . . . Moreover, the facts that do exist in the record undermine his theories." *Id*. at 42. Thus, "Acer fail[ed] to show specific evidence creating a genuine issue of material fact as to causation of a cognizable injury," and summary judgment was granted. *Id*. at *43.

Likewise, in the same case, the indirect purchaser plaintiffs were "unable to meet their burden of showing a genuine issue of material fact as to pass-through, which underlie[d] their theory of causation, injury, and damages," so they offered the testimony of their expert, Dr. Flamm, on these elements. *In re Optical Disk Drive Antitrust Litig.*, 2017 U.S. Dist. LEXIS 209281, at *53 (N.D. Cal. Dec. 18, 2017). Judge Seeborg, however, declined to accept this expert testimony: "While Dr. Flamm's report conveniently theorizes 100% pass-through at every stage in the distribution chain, his opinion does not point to, and cannot substitute for, evidence showing the disputed facts required to survive summary judgment." *Id*. at *53-54; *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 632 F. Supp. 2d 42, 56, 62-63 (D. Me. 2009) (granting summary judgment where plaintiffs' expert simply "infer[red]" impact).

Like those plaintiffs, DAPs cannot rely on Dr. Marx to bridge the gap in evidence and market facts as to causation. Without proof of concrete injury, DAPs' claims cannot proceed to a jury.

II. IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT SHOULD BE GRANTED ON DAPS' CLAIMS BASED ON PURCHASES FROM KEMET AND AVX AS WELL AS PURCHASES OF FILM CAPACITORS.

If the Court is not inclined to grant Defendants' Motion based on a lack of evidence of a causal injury, DAPs' claims should nevertheless be tailored to reflect the evidence of conspiracy. As set forth in the individual Motions for Summary Judgment brought by KEMET and AVX, there is insufficient evidence of them joining or participating in a conspiracy to fix the prices of capacitors sold to DAPs, or anyone else. Thus, partial summary judgment should be granted to exclude KEMET and AVX sales from DAPs' claims.[71]

DAPs' complaints are undeniably premised on evidence of group meetings among Japanese manufacturers in Asia and government investigations of those meetings. But a rational jury could not conclude that AVX and KEMET attended any of those meetings. The discussions at those meetings and the identities of the meeting participants are recorded in detailed meeting reports covering the entire relevant time period.[72] Yet in the ***hundreds*** of meeting minutes, summaries, and notes of those communications there is no record of KEMET or AVX ever attending. Indeed, DAPs' own expert readily acknowledged at deposition [redacted][73] This dearth of evidence is corroborated by the fact that neither KEMET nor AVX were prosecuted by DOJ or any other antitrust enforcement agency that investigated the capacitors industry, including those in Japan, Korea, Taiwan, Singapore, Brazil, and Europe.

An additional reason why a reasonable jury could not conclude that KEMET and AVX joined the alleged conspiracy is because there is direct evidence that they did not. For instance

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[71] Partial summary judgment may also be entered on claims relating to DAPs' purchases from Nichicon (America) Corporation, United Chemi-Con, Milestone Global Technology (d/b/a HolyStone International), and Hitachi Chemical Co. America, Ltd., all of which have filed their own Motions for Summary Judgment due to a lack of evidence that they participated in the alleged conspiracy.

[72] Rubycon alone produced detailed reports from more than 300 of these meetings.

[73] Ex. 11 (Marx Dep.) at 192:23-193:20 [redacted]"); *id.* at 175:1-22 [redacted]; *id.* at 223:8-225:21 [redacted]; *id.* at 225:23-226:6 [redacted]

there are documents authored by individuals who attended the group meetings in Japan stating that: "[redacted]"[74] Likewise, individuals who attended the Japanese group meetings uniformly testified [redacted][75] In addition, corporate representatives for Defendants that were prosecuted by DOJ or fined by foreign regulators have unequivocally asserted [redacted][76] All of this justifies a grant of partial summary judgment on DAPs' claims based on purchases from KEMET and AVX.

Likewise, partial summary judgment of DAPs' claims based on their purchases of film capacitors should also be granted in Defendants' favor. As set forth in the Film-Only Defendants' Motion for Summary Judgment, there is insufficient evidence of a conspiracy involving film capacitors, and DAPs's claims against other Defendants should reflect that reality.

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[74] Ex. 18 (RUB_003354745 at 746-747, previously marked in this litigation as Deposition Exhibit 8253).

[75] For example, Mr. Kazuhiko Mitsuhori, a senior Rubycon sales representative who attended multiple "group" meetings, testified that [redacted] Ex. 19 (Deposition of Kazuhiko Mitsuhori ("Mitsuhori Dep.")) at 289:13-290:3. Mr. Mitsuhori also testified [redacted] *Id.* at 292:2-8. Similarly, when Mr. Akira Nakayama, another senior Rubycon attendee at group meetings, [redacted] he testified, [redacted]" Ex. 20 (Deposition Transcript of Akira Nakayama ("Nakayama Dep.")) at 281:22-282:16.

[76] The corporate 30(b)(6) witnesses of Panasonic, NCC, Nichicon, Hitachi, Matsuo, and Elna consistently testified [redacted] Ex. 21 (Deposition Satoshi (Leo) Komoda) at 288:1-21; Ex. 14, (Sheldon Dep.) at 739-747; Ex. 17 (Fujisaku Dep.) at 225-228; Ex. 16 (Koga Dep.) at 277-279; Ex. 13 (Sterret Dep.) at 411-423; Ex. 22 (Deposition of [redacted] Ex. 23 (Deposition of Shinichi Torii) at 29:24-30:1.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant this Court grant this Motion because DAPs have no factually-supported theory or evidence demonstrating that the prices they paid in the United States on all of their capacitor purchases from Defendants were inflated by the alleged conspiracy. Alternatively, Defendants' respectfully request that the Court grant partial summary judgment on DAPs' claims based on sales from KEMET, AVX, and other United States-based Defendants, as well as DAPs' purchases of film capacitors.

DATED: June 14, 2019

RESPECTFULLY SUBMITTED

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CERTIFICATE OF SERVICE

I, Eric P. Enson, declare:

I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 555 South Flower Street, Fiftieth Floor, Los Angeles, California 90071-2300. On June 14, 2019, I served a copy of: **CERTAIN DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND, IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT ON DIRECT ACTION PLAINTIFFS' CLAIMS** by electronic transmission.

I am familiar with the United States District Court, Northern District Of California San Francisco Division's practice for collecting and processing electronic filings. Under that practice, documents are electronically filed with the court. The court's CM/ECF system will generate a Notice of Electronic Filing (NEF) to the filing party, the assigned judge, and any registered users in the case. The NEF will constitute service of the document. Registration as a CM/ECF user constitutes consent to electronic service through the court's transmission facilities.

Executed on June 14, 2019, at Los Angeles, California.

/s/ Eric P. Enson
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